No. 89-1132

In The

Supreme Court Of The United States

Supreme Court, U.S.
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GROVER C. JONES, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the court of appeals err in holding that it was only harmless error for the district court not to articulate on the record all of the factors required to be considered by the Speedy Trial Act when it dismissed a preceding indictment without prejudice?

2. Did the court of appeals err in the summary dismissal of issues raised by the defendant concerning the enforcement of a negotiated plea agreement, the admission at trial of certain similar acts evidence pursuant to Rule 404(b) of the Federal Rules of Evidence, and the sufficiency of the evidence as to the use of the mails in

furtherance of the alleged scheme to defraud as to certain charges?

DESIGNATION OF PARTIES

The parties to the appeal before the United States Court of Appeals for the Fourth Circuit were the Petitioner, Grover C. Jones, Jr., and the Respondent, the United States of America. Said parties are the same as were before the court of original jurisdiction, the United States District Court for the Southern District of West Virginia.

TABLE OF CONTENTS

	PAGE
Questions Presented.....	1
Designation of Parties.....	2
Table of Contents.....	3
Table of Authorities.....	4
Opinions Below.....	7
Jurisdictional Statement.....	7
Constitutional Provisions and Statutes Involved.....	8
Statement of the Case.....	10
Argument for Allowance of the Writ.....	18
Conclusion.....	52
Certificate of Service.....	53
Appendix.....	55

TABLE OF AUTHORITIES

CASES PAGE

SUPREME COURT

Mabry v. Johnson,
467 U.S. 504 (1984).....47, 48, 50

Santobello v. New York,
404 U.S. 257 (1971).....43

United States v. Maze,
414 U.S. 395 (1974).....33, 37

United States v. Taylor,
___ U.S. ___, 108 S.Ct.
2413 (1988).....19, 21

COURT OF APPEALS

Cooper v. United States,
594 F.2d 12 (4th Cir.
1979).....43, 44, 50

Harris v. Superintendent, Va.
State Penitentiary,
518 F.2d 1173 (4th Cir. 1975).....51

United States v. Carter,
454 F.2d 426 (4th Cir. 1972)...43, 44

United States v. Castille,
795 F.2d 1273 (6th Cir. 1986).....34

United States v. Cavender,
578 F.2d 528 (4th Cir. 1978)...22, 23

United States v. Coon,
805 F.2d 822 (8th Cir. 1986).....49

United States v. Harvey,
791 F.2d 294 (4th Cir.
1986).....43, 44, 45, 47

United States v. Harvey,
885 F.2d 181 (4th Cir.
1989).....22, 24, 25, 26, 28

United States v. Jones,
887 F.2d 492 (4th Cir.
1989).....7, 29, 37

United States v. LaFerriere,
546 F.2d 1273 (6th Cir. 1977).....35

United States v. McIntosh,
612 F.2d 835 (4th Cir. 1979)...43, 46

United States v. White,
864 F.2d 660 (9th Cir. 1988).....20

FEDERAL STATUTES AND RULES

18 U.S.C. §3162(a)(2).....8, 12, 27

Federal Rules of Evidence
Rule 404(b).....9

U.S. CONSTITUTIONAL PROVISIONS

Fifth Amendment.....8

Sixth Amendment.....8

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals sought to be reviewed is reported at 887 F.2d 492 (4th Cir. 1989). It is reproduced in the appendix, infra p. 3-25. An Order on Rehearing was issued in the case by the court of appeals on November 15, 1989 and it is reproduced in the appendix, infra p. 26-27. The district court opinions and orders which are relevant to issues raised are unpublished and are reproduced in the appendix, infra p. 28-111.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). The court of appeals judgment was entered on October

17, 1989. A Petition for Rehearing with a suggestion for rehearing en banc was timely filed. It was denied by order of November 15, 1989. The instant petition for writ of certiorari is timely filed pursuant to Rules 20.1 and 20.4 of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The instant matter involves the Fifth Amendment and Sixth Amendment to the United States Constitution which are reproduced in the appendix, infra p. 1-2. Title 18 U.S.C. §3162(a)(2), also relevant to an issue raised, provides:

> (2) If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant.

> The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3). In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice. Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.

Rule 404(b) of the Federal Rules of Evidence, also relevant to one of the issues raised herein, provides:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not

> admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

Grover C. Jones, Jr. ("defendant") was arrested on charges of mail fraud (based on an alleged scheme to defraud an insurance company for making a false claim) on October 17, 1984. He was ordered on the same day, by the committing United States Magistrate, to undergo an evaluation to determine his mental competency, pursuant to 18 U.S.C. §4244. The defendant remained confined for purposes of the evaluation beyond the period permitted by applicable

statute and initial trial proceedings, following the indictment process, were not scheduled to commence until 126 days after the defendant's initial appearance before the magistrate. The district court dismissed the indictment, without prejudice, for the reason that the defendant was not brought to trial within the time period of seventy days after indictment as required by the Speedy Trial Act, 18 U.S.C. 3161(c)(1) (the "Act"). In its order, subsequently amended to reflect that the dismissal was without prejudice, the district court addressed the "facts and circumstances leading to the dismissal", one of the three factors required to be considered under §3162(a)(2) of the Act in determining whether the subject indictment should be dismissed with or

without prejudice. App. at 28-37. However, the district court never analyzed, even in subsequent pre-trial proceedings and related orders when the matter was repeatedly raised by the defense on motion, the remaining two factors that are set forth in the Act, namely, "the seriousness of the offense . . . and the impact of a reprosecution on the administration of this chapter and on the administration of justice." Title 18, U.S.C. §3162(a)(2); App. at 28-53, 99-101. Rather, the district court simply held that no written analysis of each factor was required and that it was nevertheless "pleased to report that it did mentally consider all such factors", even though it never sought to address or analyze them. App. at 44.

The five charges which are the basis of the subject convictions were based on a single fire which occurred on October 29, 1981 and which involved a commercial building in Matoka, West Virginia (the "Matoka Fire"). Specifically, the defendant was charged with having devised with others (who testified as prosecution witnesses at trial) a scheme to defraud the insurer of the structure (Aetna Casualty and Surety Company) by burning the building by arson and submitting a false claim to the insurer for the resulting loss.

The defendant was ultimately indicted and prosecuted alone, following two preceding indictments in which various alleged co-conspirators were also charged. Each count of the five count indictment upon which the

defendant ultimately proceeded to trial alleged that he and four other individuals, aided and abetted by eachother, knowingly used the United States mails (or caused them to be used) to deliver insurance-related documents for the purpose of executing the alleged scheme. Such acts were alleged to be in violation of 18 U.S.C. §§1341 and 2, thus invoking the jurisdiction of the district court.

The prosecution introduced at trial, over the objections of the defense, so-called "similar acts" evidence of some five previous incidents with which the defendant was alleged to have been involved. The prior, similar acts evidence concerned incidents that had occurred as long as five years before the one which was the basis of

the subject prosecution and eleven of the prosecution's eighteen trial witnesses testified exclusively about the similar acts evidence, while three of the remaining seven prosecution witnesses were the key government witnesses who each testified extensively about the similar acts evidence as well as the subject incident and related activities. In addition, only eight of some sixty government exhibits in the prosecution's case-in-chief related to the fire which was the basis of the prosecution. The trial court admitted such similar acts evidence pursuant to Rule 404(b) of the Rules of Evidence, finding that they were probative of the defendant's possible motive, plan, preparation and lack of mistake and/or accident. App. at 54-67, 102-111.

The prosecution and defense engaged in extensive plea negotiations before trial which the prosecution ultimately terminated when it declined to proceed, asserting that no agreement had been reached on any terms. However, the defendant moved the district court to enforce the plea agreement which he asserted had been reached and the district court found, after an extensive pre-trial hearing, that an agreement had been reached between the parties as to certain terms, including the basic agreement that the prosecution would dismiss all charges then pending against the defendant if the latter plead guilty to two different allegations which had a combined possible maximum penalty of five years imprisonment. The district court announced the terms of the

agreement which it stated it had found from the evidence to have been agreed upon by the parties and directed the defendant to elect whether he wished to proceed on the agreement as defined by the district court or proceed to trial on the pending charges. The defendant elected to proceed to trial for the stated reason that the district court had misstated or otherwise misinterpreted the terms of the agreement that had been reached by the parties. Specifically, the defendant asserted that the district court had excluded a necessary element of the agreement that had been reached by the parties, namely, that the prosecution had agreed to recommend to the district court at sentencing that the defendant be given credit toward any period of

incarceration that may be imposed for "time served" corresponding to the period of time while he was in custody undergoing the court ordered psychiatric evaluation before trial and while he was under so-called "house arrest" on bond, pending trial.

The defendant was thereafter convicted on all counts of the subject five count indictment after an eight day jury trial and he was subsequently sentenced to an active period of incarceration of fifteen years, plus probation with special conditions (including forty hours of community service per month for the entire period of probation) and fines totaling Five Thousand Dollars ($5,000.00).

ARGUMENT FOR ALLOWANCE OF THE WRIT

1. **The court of appeals' decision is in conflict with this Court's opinion in the controlling case of United States v. Taylor, ____ U.S. ____, 108 S. Ct. 2413 (1988), and is inconsistent with the decisions of other courts of appeals in regard to the interpretation of a basic requirement of the Speedy Trial Act and appellate procedure.**

The court of appeals held that the district court committed only harmless error by failing to address two of the three considerations that are required by the Speedy Trial Act to be articulated by the court in any decision to dismiss an indictment with or without prejudice for violation of the Act. The court of appeals attempted to distinguish the defendant's situation from that in Taylor and United States v.

White, 864 F.2d 660 (9th Cir. 1988), also relied on by the defendant on appeal, on the basis that its review, sua sponte, of the record in Jones supported the district court's ultimate conclusion to dismiss the subject indictment without prejudice whereas the Taylor and White opinions do not reveal that there was a sufficient basis in those respective records to substantiate the district courts' conclusions.

However, this Court's holding in Taylor would seem to be clear and unequivocable in mandating that a district court must "clearly articulate", on the record, its analysis of all the required factors, not only for purposes of compliance with the statute in question (the Speedy Trial

Act) but also as a basic precondition for considered appellate review:

> Where . . . Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Only then can an appellate court ascertain whether a district court has ignored or slighted a factor that Congress has deemed pertinent to the choice of remedy, thereby failing to act within the limits prescribed by Congress.
>
> . . .
>
> [T]he administration of the Speedy Trial Act and the necessity for thorough appellate review require that a district court carefully express its decision whether or not to bar reprosecution in terms of the guidelines specified by Congress.

Taylor, 108 S.Ct. at 2419, 2422-23 (emphasis added).

The court of appeals' decision emphasizes how the court thoroughly reviewed the district court record but there does not appear to be any precedent for utilizing such a procedure as regards to the particular issue in question, and, in fact, such a procedure appears contrary to the court of appeals' own decisions in such analogous situations as those in United States v. Cavender, 578 F.2d 528 (4th Cir. 1978), if not also the more recent decision in United States v. Harvey, 885 F.2d 181 (4th Cir. 1989).

Specifically, the court of appeals in Cavender reversed and remanded on the issue of whether or not the district court properly allowed evidence of a defendant's prior record to be utilized by the government on cross-examination

(pursuant to Rule 609(b) of the Federal Rules of Evidence) because the district court failed "to support its finding with 'specific facts and circumstances'". Cavender, 578 F.2d at 531. Although the precise legal issue in Cavender was obviously different from that in the instant case concerning the requirements of the Speedy Trial Act, nevertheless, it would seem that the court's rationale in Cavender, which requires specific findings on the record so as to allow for considered appellate review, would apply with equal force and logic to the present situation.

Likewise, in Harvey, the court of appeals recently reversed and remanded to the district court for it to make specific findings as to the basis for its denial of a motion to reduce the

imposition of a fine, the court noting that:

> We vacate and remand for reconsideration because the district court's failure to make specific findings makes effective appellate review impossible on the present record.
>
> Harvey, 885 F.2d at 182.

The issue in Harvey concerned the interpretation of 18 U.S.C. §3622 (superseded by 18 U.S.C. §3572) which the court of appeals found requires the consideration and articulation on the record by the district court of certain statutory factors before imposing a fine as part of a sentence. The district court in Harvey failed to make such specific findings and the court of appeals remanded to the "district court to make specific fact findings on these

factors in order to permit effective appellate review". Id.

Of special significance is the court of appeals insistence in Harvey that the case be remanded without any apparent effort or desire on its part to review the record, sua sponte, to determine whether the district court's conclusion had a basis in the record so as to justify a finding of harmless error as it did in the instant matter. Moreover, the court of appeals in Harvey emphasized how such a result (remand for specific findings by the district court) was required by such precedent as Taylor, the very precedent relied on by the defendant herein. Id., at 183 n.*. In fact, the court in Harvey specifically notes that the statute under consideration, 18 U.S.C. §3572,

and also the Victim and Witness Protection Act, 18 U.S.C. §3664, do not, by their own terms, require specific findings but that such is nevertheless necessary for "effective appellate review":

> Although neither statute by its terms requires the district court to make specific findings with regard to the listed factors, such findings are as essential to effective appellate review of the fines imposed pursuant to §3622 [now superseded by 18 U.S.C. §3572] as [is] restitution imposed pursuant to former §3580.
>
> Id. at 183.

The same rationale presumably applies to an interpretation of the Speedy Trial Act provision at issue which is also silent in requiring findings to be made

on the record by the district court. 18 U.S.C. §3162(a)(2).

Indeed, the majority opinion in Harvey, relying on this Court's opinion in Taylor, in responding to a dissenting opinion, discussed in detail the very issue presented by the defendant as to the necessity for remand for specific fact-finding by the district court:

> As the courts, preeminently the Supreme Court, and respected commentators consistently have recognized, the effect of such legislatively imposed "guides" or "constraints" upon the exercise of trial court discretion is two-fold. It requires trial judges to observe the constraints and to record the way in which they have done so, and it imposes upon reviewing courts the corollary obligation to assess specific exercises of discretion for "abuse" in light of the constraints. See, e.g., United States v. Taylor, ____ U.S. ____, ____, 108 S.Ct. 2413, 2419-20 (1988)

("factors" to be considered in dismissing with or without prejudice for Speedy Trial Act violations); [United States v.] Bruchey, 810 F.2d at 458; Friendly, Indiscretion About Discretion, 31 Emory Law Journal 747, 767-71 (1982); M. Rosenberg, Judicial Discretion of the Trial Court, Viewed From Above, 22 Syracuse L. Rev. 635, 665-61 (1971). This appellate obligation obviously cannot be met unless trial courts are required in some minimally appropriate way to evidence that they have been mindful of their obligation to take the factors into account. See, Taylor, ____ U.S. at ____, 108 S.Ct. at 2420; see also Rosenberg, supra, at 665-66; Friendly, supra at 770-71.

Harvey, 885 F.2d at 183 n.*.

The defendant would otherwise respectfully challenge the procedure which the court of appeals utilized in the instant matter where it, sua sponte, chose to review the record without any opportunity for the defendant to present

his position. For example, the court summarily concluded, in considering the factor of the "seriousness of the offense" (one of factors that must be considered by the district court by the terms of the Act in deciding to dismiss with or without prejudice for a violation) that arson is "a very serious one". Jones, 887 F.2d at 495. However, the defendant should be entitled to at least have the opportunity, whether it is likely to be successful or not, to suggest to the appropriate fact-finder, the district court, such arguments as: the offense charged should not necessarily be viewed in such absolute terms; rather, such facts and circumstances should also be considered as the fact that there was no victim as such, the scheme to defraud was not

successful, the structure which was the object of the act of arson was an unoccupied commercial building, and, in fact, the basic offense was that of fraud -- not arson.

Likewise, in considering ". . . the impact of a reprosecution on the administration of this chapter and on the administration of justice", the other required factor set forth in the Act (18 U.S.C. §3162(a)(2)) which was not specifically addressed by the district court, the defendant should have at least the opportunity to suggest to the district court that the impact of a dismissal at this juncture, with prejudice, for violation of the Act (as was found by the district court to have occurred), would not, at the very least, be as adverse as it would have been at

the time of the district court's original decision, given the fact that more than four and one-half years have passed and the defendant has been incarcerated for some thirty-three months on the same charges (including a pre-trial commitment for a psychiatric examination). Accordingly, it could be argued that a termination of the case at this stage of the proceedings would presumably have far less of an adverse impact on the Act and the administration of justice than at the time of the court's original decision and that there should therefore be a corresponding change (to the defendant's presumed benefit) in the balancing test of all three factors as set forth in the Act that must be employed by the district court. However, such an argument (if

not also an evidentiary hearing on the issue) is precluded by the court of appeal's decision.

The court of appeals' decision in Jones on at least the issue concerning the Speedy Trial Act would appear to have valued expediency (in eliminating the need for a remand to the district court) above all else, including the right of the defendant to basic due process as well as this Court's interpretation of a fundamental aspect of the Speedy Trial Act and appellate procedure. Such a precedent, if it were to remain intact without the allowance of the requested writ, would abrogate the important principles involved and permit a conflict in case precedent to persist.

2. **The court of appeals' summary dismissal of the defendant's challenge to the sufficiency of the evidence as concerns the use of the mails in the alleged scheme to defraud is inconsistent with prior precedent of this Court and other courts of appeals.**

The defendant was prosecuted for using the United States mails to perpetrate a scheme to defraud in violation of 18 U.S.C. §1341. As such, the subject mailings that were the basis of the prosecution must have been "sufficiently closely related" to the scheme to constitute evidence sufficient to convict as this Court held in United States v. Maze, 414 U.S. 395, 399 (1974). However, the mailings underlying three of the five related charges in the subject indictment

(corresponding to counts two, four and five) were not, in fact, in furtherance of the alleged scheme to defraud because they made its execution less likely.

The use of the mails which was the basis of count two consisted of blank proof of loss forms and a request for additional information from the insurer's adjustor to the insured, a mailing which closely parallels that which was found to be insufficient in United States v. Castille, 795 F.2d 1273 (6th Cir. 1986), where the Sixth Circuit Court of Appeals concluded that the mailing was "clearly a part of the overall investigation of the fires' cause, and the purposes of the letter clearly conflict with [the defendant's] scheme". Id. at 1280.

Similarly, the mailing underlying count four of the Jones indictment (which was a "request" by an attorney retained by the insurer to investigate the claim for an in-person sworn statement from the insured) is at least similar to that which was found to be insufficient in United States v. LaFerriere, 546 F.2d 182 (5th Cir. 1977), where the Fifth Circuit Court of Appeals held that such a communication "did not have any tendency to postpone inquiries or discovery of the fraud, but rather alerted the perpetrators to the fact that a victim strongly suspected that he was a victim of fraud and proposed to take remedial action". Id. at 186.

Finally, and most significantly for purposes of consideration of this

petition, the mailing underlying count five of the subject indictment was a letter from the insurer to the insured denying the claim, precisely the same type of communication in precisely the same factual context (scheme to defraud an insurance company) which the Sixth Circuit Court of Appeals held to be insufficient for conviction in Castille where such a mailing obviously did not further or facilitate the alleged scheme to defraud, but rather "announced" its failure, clearly the opposite purpose than intended by the mail fraud statute. As this Court noted in Maze:

> Congress could have drafted the mail fraud statute so as to require only that the mails be in fact used a result of the fraudulent scheme. But it did not do this; instead, it required that the use of the mails be "for the purpose of

executing such scheme or artifice . . ."

Maze, 414 U.S. at 405.

The court of appeals' summary disposition in a footnote reference ("we have reviewed these contentions and find them to be without merit") of this and the remaining issues that are addressed in this petition, creates a conflict with at least the decisions in Maze, Castille, and LaFerriere so as to necessitate the issuance of the requested writ. Jones, 887 F.2d at 496 n.4.

3. The court of appeals was in error in summarily affirming the district court's admission into evidence of certain similar acts evidence and its decision is in conflict with those of other courts of appeals.

The district court allowed the prosecution to introduce evidence of some five "similar acts" involving separate acts of arson in which the defendant was allegedly involved, directly or indirectly, pursuant to Rule 404(b) of the Federal Rules of Evidence. The defense objected and argued on appeal that such evidence should not have been admitted for various reasons (as more fully set forth in the defendant's brief on appeal), including the lack of temporal proximity as to certain of the acts and the subject incident and, ultimately, that the prejudicial impact of such similar acts evidence outweighed any probative value.

Of particular concern, not addressed by the court of appeals in its summary footnote dismissal of the issue,

was one prior act or incident (the so-called "farmhouse fire") which, although sufficiently closely related in time to the incident which was the subject of the prosecution, was clearly distinguishable in nature from not only the incident which was the subject of the prosecution but the other "similar acts" evidence which was introduced. It is therefore asserted, as it was on appeal, that such evidence was not even probative of any common scheme so as to be admissible for the purposes provided for by the Rule.

Specifically, the evidence as to that particular incident (or prior act) did not even establish that the fire in question was the result of an act of arson as would presumably be a necessary prerequisite to establish similarity

with the other acts, let alone the one which was the basis of the prosecution. More importantly, the evidence as to that particular act was uncontroverted in establishing that the structure was not insured at the time it was destroyed by fire so as to presumably remove any suggestion of similarity in a sense of a scheme to defraud by the submission of a false insurance claim.

Nevertheless, the court of appeals summarily excused or otherwise dismissed such an anomaly and apparently concluded, for reasons not explained, that the jury's attention was not diverted from the task at hand, even though the greater weight of the evidence, by far, concerned only such similar acts evidence.

4. The court of appeals erred in summarily rejecting the defendant's contention on appeal that he was denied the benefit of a negotiated plea agreement and such a conclusion by the court of appeals is in conflict with the decisions and established case law of the same and other courts of appeals as well as this Court.

The district court found, after an extensive pre-trial hearing, that the parties had reached a plea agreement as to certain terms and conditions which would have clearly been to the defendant's advantage, given the ultimate sentence imposed on the defendant in the case. App. at 68-98. However, it erroneously excluded or omitted a necessary element concerning the recommendation of the prosecution at

the time of sentencing as to "time served", the omission of which caused the defendant to decline to proceed with the remaining provisions as articulated by the district court in its pre-trial order on the issue.

The defendant asserts that the district court was clearly in error in not finding that the term in question was a consistent and unambiguous part of the agreement, as conclusively established by an examination of the record which reveals, among other things, that the particular term in question was initially suggested and repeatedly affirmed by authorized representatives of the government who were involved in the prosecution.

It is therefore submitted that the defendant has been denied the benefit of

such fundamental principals of fairness and due process as have been articulated by the same court of appeals in United States v. Carter, 454 F.2d 426 (4th Cir. 1972), Cooper v. United States, 594 F.2d 12 (4th Cir. 1979), United States v. Harvey, 791 F.2d 294 (4th Cir. 1986), and United States v. McIntosh, 612 F.2d 835 (4th Cir. 1979), as well as this Court's decision in Santobello v. New York, 404 U.S. 257 (1971), and its progeny.

As the court of appeals held in Cooper, relying in part on Santobello, the considerations justifying the enforcement of plea agreements "presuppose fairness":

> We hold instead that under appropriate circumstances -- which we find here -- a constitutional right to enforcement of plea proposals

> may arise before any technical "contract" has been formed, and on the basis alone of expectations reasonably formed in reliance upon the honor of the government in making and abiding by its proposals.
>
> Cooper, 594 F.2d at 19 (emphasis added).

Likewise, the same court of appeals noted in Harvey, that:

> [W]ith respect to federal prosecutions, the courts' concerns run even wider than protection of the defendant's individual constitutional rights -- to concerns for the "honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government".
>
> Harvey, 791 F.2d at 300 (quoting United States v. Carter, 454 F.2d at 428)).

The result should be no different if the district court, in effect,

"breached" the agreement by having misinterpreted it than if the government had failed to fulfill its obligations. Indeed, it is ultimately the integrity of the judicial system which is at issue. Moreover, the fact that it was the court and not the government that erred, thereby effectively frustrating the purposes of the agreement, should not allow the government to get "off the hook":

> Neither side should be able, any more than would be private contracting parties, unilaterally to renege or seek modification simply because of individual mistake or change of mind.
>
> Harvey, 791 F.2d at 300.

In the instant situation, as in Cooper, the provision for a non-binding recommendation by the government as to

time served was specific, unambiguous, and obviously accepted by the defense. See also McIntosh, 612 F.2d at 837-38 (J. Phillips, concurring). Furthermore, there was no question in the instant situation of the authority of those who agreed to the term in question, even if that were an issue, given the admissions of the then United States Attorney and related testimony, including evidence that the same United States Attorney had approved the terms of the first draft of the proposed agreement which included the subject condition regarding the recommendation for time served.

Thus, as the court of appeals also observed in Harvey:

> If it [the plea agreement] is unambiguous as a matter of law, and there is no suggestion of government overreaching of any kind, the

> agreement should be interpreted and enforced accordingly.
>
> Harvey, 791 F.2d at 300.

It is submitted that the Cooper decision, as it applies to the instant case, has not been overruled by Mabry v. Johnson, 467 U.S. 504 (1984), where this Court in Mabry confined its decision to the facts and procedural context of that case and held, in essence, that an accused has no constitutional claim under either the Fifth (due process) or Sixth (effective assistance of counsel) Amendment for enforcement of a plea agreement that was arrived at before conviction in a habeas corpus action where, by definition, one cannot be deprived of a liberty interest, as required to maintain a habeas action, until the point of conviction.

Moreover, in Mabry, the defendant/petitioner entered a plea of guilty after the subject plea agreement "collapsed" under factual circumstances (including, presumably, the usual voir dire by the trial court) which confirmed that the plea was not induced or otherwise based on the earlier, aborted effort:

> Respondent's plea was thus in no sense the product of governmental deception; it rested on no "unfulfilled promise" and fully satisfied the test for voluntariness and intelligence.

Id. at 510.

Some courts have cited Mabry for the proposition, among others, that there is not a constitutional right, "standing alone", to have a plea bargain enforced other than if it renders a

subsequent plea involuntary or otherwise invalid. See e.g., United States v. Coon, 805 F.2d 822, 824 (8th Cir. 1986). However, the entire portion of the opinion in Mabry to which such courts refer reveals that the Court's language is confined to distinguishing the relief which can be sought by habeas corpus from, for example, a challenge which is raised on direct appeal after a defendant, like Jones, rejects a challenged plea agreement and proceeds to trial, thereby preserving his right (as in Cooper) to address the issue on appeal:

> Respondent can obtain federal habeas corpus relief only if his custody is in violation of the Federal Constitution. A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement

> which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he convicted, and it was the conviction which gave rise to the deprivation of respondent's liberty at issue here.
>
> Mabry, 467 at 507.

Finally, as to an appropriate remedy, it is acknowledged, as the court of appeals observed in Cooper, that "full enforcement may only be approximated now", given intervening circumstances. Cooper, 594 F.2d at 20. Nevertheless, it is submitted that the defendant should be given the opportunity on remand to accept the plea agreement, as correctly defined as including the governmental recommendation as to time served,

whether or not all of its provisions would be enforceable by law and whether or not the district court would accept it or otherwise allow for it by reducing the period of incarceration at re-sentencing. Among other considerations, the defendant would want the government's recommendation as to time served while on "house arrest" on the record, even if such credit could not be ordered directly by the court, as that may possibly affect the sentence imposed or parole eligibility. Harris v. Superintendent, Va. State Penitentiary, 518 F.2d 1173, 1174 (4th Cir. 1975).

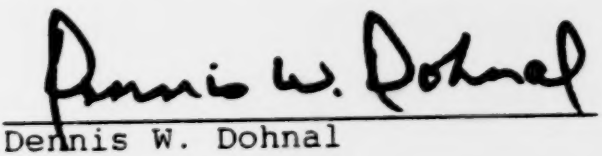
Accordingly, it is submitted that the requested writ must issue to resolve what would appear to be an inconsistency between the opinion of the court of

appeals and relevant case precedent in both this Court and other courts of appeal.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,



Dennis W. Dohnal

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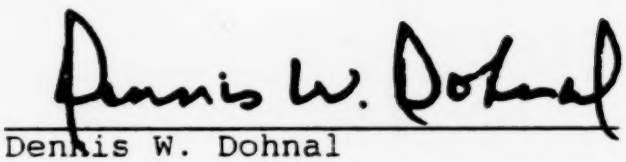
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify, pursuant to Rule 19.3 and 28 of the Supreme Court Rules, that I have on this 12th day of January, 1990, mailed, with first-class postage pre-paid, three copies of the foregoing Petition for a Writ of Certiorari to the Solicitor General, Department of Justice, Washington, D.C. 20530 and, under separate cover, three copies to Nancy C. Hill, Esquire and John P. Rowley, III, Esquire, Office of the United States Attorney, 500 Quarrier

Street, Post Office Box 3234, Charleston, West Virginia 25332, who constitute all parties that are required to be served.



Dennis W. Dohnal

APPENDIX

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

887 F.2d 492 (4th Cir. 1989)

UNITED STATES of America,
Plaintiff-Appellee,

v.

Grover C. JONES, Jr.,
Defendant-Appellant.

No. 87-5126.

United States Court of Appeals,
Fourth Circuit

Argued July 28, 1989.
Decided Oct. 17, 1989.

Defendant was convicted in the United States District Court for the Southern District of West Virginia, Elizabeth V. Hallanan, J., of mail fraud. Defendant appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that district court did not abuse its discretion in dismissing indictment without prejudice, rather than with prejudice, for speedy trial violation.

Affirmed.

See also 811 F.2d. 1505 (unpublished opinion).

1. **Criminal Law 577.16(11)**

Decision to dismiss for noncompliance with Speedy Trial Act with or without prejudice is within trial court's discretion; however, discretion is not unlimited with the Act mandating dismissal of indictment upon violation of precise time limits, and specifying criteria to consider and decide as to whether to bar reprosecution. 18 U.S.C.A. §3162(a)(2).

2. **Criminal Law 1151**

When record amply supports district court's decision to dismiss an indictment on speedy trial grounds

without prejudice, automatic reversal of that decision is not required merely because district court fails to articulate all the statutory factors it considered in determining whether to dismiss with or without prejudice; rather, abuse of discretion standard applies. 18 U.S.C.A. §3162(a)(2).

3. Criminal Law 577.16(11)

Sanction of dismissal with prejudice for speedy trial violation should ordinarily be imposed only for serious delay. 18 U.S.C.A. §3162(a)(2).

4. Criminal Law 577.16(11)

District court did not abuse its discretion in dismissing indictment without prejudice, rather than with prejudice, for speedy trial violation,

although district court did not address all three statutory factors in its written dismissal order; district court indicated that it mentally considered all factors which supported dismissal without prejudice, and delay was not intentional, was not overly long, and there was no evidence of prejudice to defendant. 18 U.S.C.A. §3162(a)(2).

Dennis William Dohnal (Bremner, Baber & Janus, Richmond, Va., on brief) for defendant-appellant.

John P. Rowley, III, Asst. U.S. Atty., Fairfax, Va. (Michael W. Carey, U.S. Atty., Nancy C. Hill, Asst.,, U.S. Atty., Charleston, W.Va., on brief), for plaintiff-appellee.

Before RUSSELL, WIDENER, and HALL, Circuit Judges.

K.K. HALL, Circuit Judge:

Grover C. Jones, Jr. appeals from his conviction on five counts of mail fraud in violation of 18 U.S.C. §§1341,2. He challenges his conviction on several grounds. After a thorough review of the record, we find those grounds without merit and affirm.

I

Jones was arrested on charges of mail fraud on October 17, 1984. The same day he was committed by a magistrate to the Federal Correctional Institution in Butner, North Carolina for an evaluation to determine his

mental competency. On November 20, 1984, he was indicted with three other individuals on five counts of mail fraud. A superseding indictment was returned on December 14, 1984 on the same charges against the same individuals, including Jones. Jones remained at Butner until December 21, 1984, when he was released on bond.

He subsequently moved to dismiss the indictment. The district court granted the motion to dismiss finding that Jones' rights under the Speedy Trial Act, 18 U.S.C. §§3161 et seq., had been violated. The court found that only thirty of the sixty-six days Jones spent at Butner for psychiatric evaluation were excludable under section

3161(h)(A) of the Act.[1/] Consequently, the original trial date of February 20, 1985 exceeded the seventy day limit of the Act by twenty-six days. Although the district court granted the motion to dismiss, its dismissal of the indictment was without prejudice.

The government appealed from the court's dismissal order, but on June 25, 1985, a grand jury returned a new indictment against Jones, charging the

---

1/ Prior to October 12, 1984, 18 U.S.C. §4244 permitted commitment for competency examination after arrest and before trial for "such reasonable period as the court may determine". The statute was amended on October 12, 1984, five days before Jones was arrested, by 18 U.S.C. §4247(b) to allow commitment for "a reasonable period, but not to exceed thirty days . . . ." When he committed Jones to Butner, the magistrate did not limit the commitment period to a specific period of time, apparently operating under the old statute.

same offenses as those charged in the two previous indictments and the government withdrew its appeal.[2/] Jones moved to dismiss the 1985 indictment on various grounds including error in dismissing the previous indictment without prejudice. The district court denied the motion and the case proceeded to trial.

2/ Jones did not appeal from the court's dismissal order. Had he done so, this court would have lacked jurisdiction to hear the appeal. See United States v. Kelley, 849 F.2d 1395 (11th Cir. 1988); United States v. Reale, 834 F.2d 281 (2d Cir. 1987); United States v. Bratcher, 833 F.2d 69 (6th Cir. 1987) (all holding that a criminal defendant may not immediately appeal when an indictment is dismissed without prejudice for a Speedy Trial Act violation). Cf. United States v. Lanham, 631 F.2d 356 (4th Cir. 1980) (holding that dismissal without prejudice is not immediately reviewable).

The charges which let to Jones' indictment stemmed from a fire that occurred in Matoaka, West Virginia on October 29, 1981. The government presented evidence at trial that Jones, Richard Lewis, John Whitlow, and his son, Joseph Whitlow, devised a scheme to defraud Aetna Casualty and Surety Company, the insurer of a building owned by Lewis, by burning the building and submitting a false claim to the insurance company for the resulting damage. The scheme began in the fall of 1981 when Jones approached Lewis, who was having business and financial problems, and suggested burning the building to collect the insurance proceeds. Lewis agreed and agreed to pay Jones $10,000 from the insurance

funds. Jones arranged for the Whitlows to burn the building. He paid them $1,500 to commit the arson. The Whitlows were arrested as they were leaving the burning building and were tried on arson charges in West Virginia state court. Lewis filed a claim with the insurance company for damage to the building due to the fire. The company retained counsel to investigate the fire and the claim was eventually denied. The facts surrounding the charges against Jones came to light when the Whitlows agreed to cooperate with authorities during the course of the state prosecution. The correspondence between Lewis and the insurance company

formed the basis for the mail fraud charges.[3/]

A jury convicted Jones on all five counts of mail fraud. He was sentenced to consecutive terms of five years imprisonment on each of the first three counts and concurrent suspended terms of five years on counts four and five. He was also fined $5,000 and placed on five years probation. Jones appeals.

II

3/ 18 U.S.C. §1341 makes it a crime to "devise any scheme or artifice to defraud . . . [and] for the purpose of executing such scheme or artifice . . . place in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or take or receive therefrom, any such matter or thing, or knowingly cause to be delivered by mail according to the direction thereon, . . . any such matter or thing."

The appellant's principal contention on appeal is that the district court failed to comply with the Speedy Trial Act when it dismissed the December 1984 indictment without prejudice. The Act provides that in determining whether to dismiss a case with or without prejudice

> the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice.

18 U.S.C. §3162(a)(2). The district court in this case addressed the "facts and circumstances" leading to the dismissal in its original order but did

not address the "seriousness of the offense" or the "impact of a reprosecution". In a subsequent order, however, entered after the appellant moved to dismiss the 1985 indictment on the ground that the court failed to address all three statutory factors in its dismissal order, the same court stated that it "did mentally consider" all the factors outlined in 18 U.S.C. §3162(a)(2) during the process of dismissing the indictment. The court found that appellant was not prejudiced by the omission of a written analysis of the two factors that were not committed to writing.

[1] The decision to dismiss for noncompliance with the Speedy Trial Act with or without prejudice is within the

discretion of the trial court. United States v. Taylor, ___ U.S. ___, 108 S.Ct. 2413, 101 L.Ed.2d 297 (1988). United States v. Brainer, 691 F.2d 691 (4th Cir. 1982). That discretion, however, is not unlimited, the Act mandating dismissal of an indictment upon "violation of precise time limits, and specifying criteria to consider in deciding whether to bar reprosecution". 108 S.Ct. at 2423. In Taylor the Supreme Court ruled that a district court's dismissal with prejudice under section 3162(a)(2) was an abuse of discretion where the court failed to set out relevant factual findings and to clearly articulate its application of the statutory factors to the facts of the case. Jones does not argue that the

district court abused its discretion in dismissing his indictment without prejudice, but argues that Taylor automatically entitles him to a remand for the court to address the two statutory factors it previously failed to address. We do not read Taylor quite so broadly.

In Taylor the Court found it significant that Congress had included clear and specific factors for a district court to consider in deciding whether to bar reprosecution, i.e., whether to dismiss an indictment with or without prejudice. The Court found that because the factors were listed in the statute, the statute required that those factors be applied to each case.

> In the Speedy Trial Act . . . Congress specifically and

> clearly instructed that courts "shall consider, among others, each of the following factors," §3162(a)(2) (emphasis added), and thereby put in place meaningful standards to guide appellate review . . . Where, as here, Congress has declared that a decision will be governed by consideration of particular factors, a district court must carefully consider those factors as applied to the particular case and, whatever its decision, clearly articulate their effect in order to permit meaningful appellate review. Id. at 2419.

The appellant relies on this language to support his claim that he is entitled to a remand for consideration of the factors in the statute. Under the circumstances of this case, we do not believe that a remand is required.

In Taylor the Supreme Court did not reverse simply because the district

court failed to address one or more of the statutory factors. Although the Court emphasized the importance of a district court articulating its reasons for its choice of remedy and addressing the factors set out by Congress, it reversed because, after analyzing the district court's decision in the framework of the Act and in light of the record, it found that the court had abused its discretion with regard to the merits of the speedy trial claim. "The District Court failed to consider all the factors relevant to the choice of a remedy under the Act. What factors it did rely on were unsupported by factual findings or evidence in the record". Id. at 2423.

During oral argument of this case, appellant referred us to United States v. White, 864 F.2d 660 (9th Cir. 1988), where the court relied on Taylor in reversing a conviction because the district court failed to make specific factual findings and to discuss the statutory factors in support of its decision to dismiss without prejudice under section 3162(a)(2). In White, the court remanded the case to the district court for analysis and articulation of the application of the statutory factors to the facts of that case.

Jones urges us to follow the Ninth Circuit and remand his case for analysis of the statutory factors. In White the district court made no specific factual findings in support of its decision to

dismiss without prejudice and the record contained no discussion of the statutory factors. The linchpin of the reviewing court's decision to reverse was that it was unable to find an adequate basis in the record for the district court's decision. We do not believe the case before us mandates the same result.

[2] Though we certainly do not minimize the importance of the Court's holding in Taylor with regard to articulation of the statutory factors, where the record amply supports the district court's decision, we do not believe Taylor requires automatic reversal. Instead, we choose to apply the abuse of discretion standard recognized in Taylor to the facts of this case, and in doing so, acknowledge

that we must "undertake more substantive scrutiny" than would otherwise be the case, "to ensure that the judgment is supported in terms of the factors identified in the statute". 108 S.Ct. at 2420. Unlike White, the record here is sufficient for us to make a determination of whether the district court's decision to dismiss without prejudice was an abuse of discretion. After carefully reviewing the record we conclude that the district court did not abuse its discretion and that to remand the case, as the appellant requests, would not only be unnecessary, but would be pointless.

[3, 4] The first factor to be considered under the statute is the seriousness of the crime. In this case,

we recognize that the crime charged is a very serious one. Where this is true, the sanction of dismissal with prejudice should ordinarily be imposed only for serious delay. United States v. Carreon, 626 F.2d 528 (7th Cir. 1980). Second, although the original trial date was 126 days after the indictment, thirty of those days were excludable for a determination of appellant's mental competency. Thus, the trial date was scheduled twenty-six days outside of the Act. However, as we previously pointed out in footnote one of this opinion, the statute providing for competency examination after arrest and before trial was amended only days before appellant's arrest and under the previous statute there would have been

no violation of the Speedy Trial Act. It appears that the magistrate simply applied the wrong statute. With regard to the third factor, i.e., the impact of a reprosecution on the administration of the Speedy Trial Act, there is no evidence that a delay in the trial date was for the government to obtain a tactical advantage, that the delay was purposeful or that the appellant was prejudiced by the delay. See United States v. Simmons, 786 F.2d 479 (2d Cir. 1986). Under the circumstances, where the delay was not intentional, was not overly long, and there is no evidence of prejudice to the appellant, we find that the district court did not abuse its discretion in dismissing the indictment without prejudice. Even though the

district court failed to give a written analysis of the statutory factors as it should have done, that failure was harmless in view of the fact that the record amply supports the decision.

Accordingly, the judgment of the district court is affirmed.[4/]

AFFIRMED.

4/ Jones also argues that the district court erred in: (1) its ruling regarding an alleged plea agreement; and (2) in allowing evidence of similar acts under Fed.R.Evid. 404(b). Also, he argues that the evidence on counts two, four, and five was not sufficient to sustain his conviction. We have reviewed these contentions and find them to be without merit.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-5126

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

GROVER C. JONES, JR.

Defendant - Appellant

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Hall with the concurrence of Judge Russell and Judge Widener.

For the Court,

JOHN M. GREACEN
CLERK

Filed, November 15, 1989
U.S. Court of Appeals
Fourth Circuit

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal Action No. 84-10015-02

GROVER C. JONES, JR.

ORDER

This matter comes before the Court on Defendant's motion to dismiss the indictment. Defendant alleges that he was wrongfully committed to FCI Butner for determination of his mental competency. A procedural history of this matter is necessary in order for the Court to articulate fully the reasons for its ruling herein.

Defendant Grover Jones was arrested on October 17, 1984, and brought before Magistrate Charles T. Cunningham on charges for which he was later indicted on November 20, 1984. At said appearance before the Magistrate, the Government moved to have Defendant Jones committed to FCI Butner pursuant to the provisions of Title 18 United States Code Section 4244.

On October 12, 1984, the law governing commitment of a Defendant for determination of competency was amended. On the date of Defendant's appearance before the Magistrate, the applicable statute was Title 18 United States Code Section 4241. Defendant argues that prior to commitment to FCI Butner, Section 4241 requires a hearing. The

Court is of the opinion that this contention is without merit. Under Section 4241(b), a Defendant may be examined prior to any hearing on Defendant's competency. Such examination under Section 4241(b) must be conducted in accordance with the provisions of Title 18 United States Code Section 4247(b).

Section 4247(b) states that "pursuant to an order under section 4241, 4244, or 4245, the court any commit the person to be examined for a reasonable period, but not to exceed thirty days . . . ." (Emphasis added.)

Defendant was at FCI Butner for a period of 66 days. Under 18 United States Code Section 4244, in effect prior to October 12, 1984, Defendants

could be committed for a "reasonable period of time as the Court may determine". The Court Order entered by the Magistrate in this case did not limit the time to a specific period of time. The fact remains that Defendant Jones was at FCI Butner for a period of sixty-six (66) days. This commitment was clearly in violation of the applicable statute in effect at the time of the hearing.

Under Title 18 United States Code Section 3161, the law requires that the trial in a criminal matter be set no later than seventy days after Defendant's initial appearance. This appearance took place on October 17, 1984. A delay is allowed in computing the seventy (70) days for any delay

"resulting from any proceeding including any examination, to determine the mental competency or physical capacity of the defendant" 18 U.S.C. Section 3161(h)(1)(A). Had Defendant's commitment under Section 4244 been valid, the original trial date of February 20, 1985 would not have violated the Federal Speedy Trial Act.

However, 18 United States Code 4241 only allows for commitment for a period of thirty (30) days in a case such as this with which the Court is now faced. Therefore, the Court can only find that thirty (30) days are excludable under the Federal Speedy Trial Act, 18 United States Code Section 3161. A total of one hundred twenty-six days passed from Defendant's trial date of February 20,

1985. Excluding the thirty days for a proper commitment under 18 United States Code Section 4247(b), a balance of ninety-six days remains.[1/]

The Government argues that Defendant could have filed a motion to reconsider, or in the alternative, a motion for habeas corpus relief once he was at FCI Butner, the Court is of the opinioni that this argument is without merit. It is clear from the transcript

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1/ The Court Notes that under the old statute, the trial date would not have violated 18 United States Code 3161.

of Defendant's appearance before Magistrate Cunningham that Defendant Jones in no way waived any rights under 18 United States Code 4241. The law does not impose any burden on the Defendant to ensure that his constitutional due process rights are not violated.

Therefore, the Court finds that Defendant's Speedy Trial Rights, pursuant to Title 18 United States Code Section 3161, have indeed been impermissibly violated.

Accordingly, it is ORDERED that Defendant's motion to dismiss the indictment be, and the same is, GRANTED.

The Clerk is directed to mail a certified copy of this Order to the Defendant, counsel of record, the United

States Marshal's Service and the Probation Department of this Court.

ENTER:

ELIZABETH V. HALLANAN
United State District Judge

Date of Entry, April 3, 1985.

IN THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal Action No. 84-10015-02

GROVER C. JONES

ORDER

It is hereby ORDERED that the Order entered in the above-captioned matter be, and the same is, AMENDED so that the following correction is clear.

Under 18 U.S.C. §3161, trial must be set within seventy days of the Defendant's first appearance, or the date of the formal indictment. Defendant Jones was not indicted until November 20, 1985. Therefore, trial

should have been set within seventy days of that date. The Government, again, argues that a delay pursuant to 18 U.S.C. §3161 may be discounted for the period Defendant was at FCI Butner.

The Court finds that this argument is simply without merit. On November 20, 1985, Defendant had already spent the thirty (30) days permissible under 18 U.S.C. §4247(b). Therefore, none of the time that Defendant was at FCI Butner after the indictment was handed down is excludable for purposes of the Speedy Trial Act, 18 U.S.C. §3161.

Accordingly, it is ORDERED that Defendant's motion be, and the same is, GRANTED. Further, the indictment against the Defendant Jones is ORDERED DISMISSED without prejudice.

IT IS SO ORDERED this 4th day of April, 1985.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge

Date of Entry, April 4, 1985.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal Action No. 1:85-00080

GROVER C. JONES, JR.

MEMORANDUM ORDER

On the 22nd day of January, 1986 the Defendant, Grover C. Jones, Jr., appeared before the Court in person and through his counsel Messrs. W. Dale Greene and Harry L. Kirkpatrick, III. The United States also appeared through its counsel, First Assistant United States Attorney Wayne A. Rich, Jr., and Assistant United States Attorney Charles T. Miller.

The Defendant and the aforementioned counsel were before the Court via the motions submitted by the Defendant and the United States which are pending in the above-styled action. The hearing was scheduled by an Order entered by this Court on January 6, 1986.

The Defendant through his counsel verbally requested that a brief in camera hearing be conducted prior to the hearing on motions. The Court granted the Defendant's request. Consequently, the Defendant and counsel for both parties convened in the Court's chambers. Wereupon, the Defendant made a motion and certain matters were discussed. Defendant's in camera Exhibit Number One was marked and

admitted into evidence. Said exhibit and the Court Reporter's stenographic notes of that hearing are hereby ORDERED SEALED until further Order by this Court. During the course of the hearing and by agreement of counsel, a hearing on motions pursuant to Rule 404(b) of the Federal Rules of Evidence was RESCHEDULED for 9:30 a.m., on January 23, 1986 in this Court sitting in Beckley, West Virginia.

Upon consideration of the in camera hearing, the Court convened in the open Courtroom to hear argument on the aforesaid pending motions. After having heard the argument of counsel, the Court made the following rulings on the following motions:

. . .

[irrelevant portions excluded]

II. Is the Order of April 4, 1985 Void?

The Defendant contends that because this Court failed to laboriously list each factor in Title 18, United States Code, Section 3162(a)(2), make a finding vis a vis each factor and provide the Defendant a hearing concerning each factor, the Court's dismissal of the first indictment without prejudice is void and the Defendant's rights to due process have been violated.

At the outset, the Court reminds the Defendant that if the Order of April 4, 1985 were found to be void, there would be no way of determining with

certainty whether or not the first indictment was dismissed with or without prejudice. This would leave the matter in a state of legal limbo. Technical presumptions and speculation would have to be employed to divine and possibly defeat the intent of this Court which intent was to dismiss the indictment without prejudice. This would indeed be a victory for form over substance.

Next, the Court wishes to emphasize that the amendment of April 4, 1985 was issued one day following the original dismissal Order. Thus, the Defendant was in no way prejudiced by the delay in notification as to the status of the dismissal. Hence, the Defendant's preparations to oppose the Government's appeal or to oppose reindictment were

not hampered by the one day delay in notifying the Defendant of the status of the dismissal.

The Court is aware that the factors specified in Title 18, United States Code, Section 3162(a)(2) shall be considered prior to deciding whether to dismiss an indictment or information with or without prejudice. United States v. Carreon, 626 F.2d 533 (7th Cir. 1980). The Court is pleased to report that it did mentally consider, inter alia, the factors outlined in Title 18, United States Code, Section 3162(a)(2) during the process of dismissing the first indictment. The Court in its Order entered April 3, 1985 did carefully cite and consider the facts and circumstances leading to the

dismissal. This is one of the factors the Court is required to consider pursuant to Title 18, United States Code, Section 3162(a)(2). The Court was, however, remiss in omitting a written analysis of the other two factors even though Title 18, United States Code, Section 3162(a)(2) does not specify that it is necessary to submit each factor to a written analysis. The Court cannot conceive of any way that the Defendant has been prejudiced by the omission of a written analysis of the other two factors in the applicable statute. The Court certainly finds that its omission does not rise to the level of a denial of due process. Due process in infringed when a procedure tends to shock the sense of fair play. Howard v.

United States, 372 F.2d 294, 301 (9th Cir. 1967), cert. denied 388 U.S. 915 (1967); Galvan v. Press, 347 U.S. 522 (1954). Failure of the Court to provide the aforementioned written analysis of all factors does not shock this Court's sense of fair play.

During oral argument the Defendant cited the following cases in support of his contentions herein: United States v. Carreon, 626 F.2d 528 (7th Cir. 1980); United States v. Bittle, 699 F.2d 1201 (D.C. Cir. 1982); United States v. Fielding, 630 F.2d 1357 (9th Cir. 1980). The Court finds Bittle inapposite to the issues herein. Carreon and Fielding are different from the case at bar but warrant an analysis. At the outset the Court notes that of those two cases

neither states that a Court must submit all or any of the factors in Title 18, United States Code, Section 3162(a)(2) to a written analysis. This Court has already said that it considered all the factors and submitted one to a written analysis.

In Carreon the relevant facts are that the Defendant moved to dismiss an indictment on speedy trial grounds. While the Defendant's motion was pending, a superseding indictment was returned. The trial judge dismissed the prior indictment without prejudice and over the Defendant's objections. The Defendant was ultimately convicted under the superceding indictment. The United States Court of Appeals for the Seventh Circuit affirmed the district court's

actions. In its decision affirming the district court the Court of Appeals states that when deciding whether to dismiss an indictment with or without prejudice the court "must consider" the factors listed in Title 18, United States Code, Section 3162(a)(2). Carreon, supra, at 533. (Emphasis supplied.) The Court went on to analyze each factor to determine if the district court had erred.

This Court reads Carreon to hold that if a court of appeals finds that a district court's dismissal of an indictment or information without prejudice is clearly wrong vis a vis the factors specified in Title 18, United States Code, Section 3162(a)(2), the a Defendant is likely to prevail on an

appeal challenging such a dismissal. The Court in Carreon is concerned with whether the district court's decision was substantively correct. The Carreon Court is concerned with whether or not the district court's analysis of each or all of the factors in Title 18, United States Code, Section 3162(a)(2) was flawed. In Carreon the Court is not concerned with whether or not each statutory factor was submitted to written analysis. Rather, the Carreon Court is carefully reviewing the result reached by the district court by measuring that result against the statutory factors.

This Court believes beyond peradventure that its decision to dismiss the indictment in the case at

bar will easily withstand scrutiny under the Carreon test. It is this Court's firm conviction that an analysis of the dismissal result reached by this Court measured against the statutory factors will lead any Court to the conclusion that the Defendant was only entitled to a dismissal of the indictment without prejudice.

In Fielding, the Defendant objected to the trial court's having granted the government a one month continuance. The Defendant was convicted. On appeal the district court was reversed. However, the one month continuance was not the ground upon which reversal was granted.

During the course of the decision the Fielding Court states that "[f]ailure to consider factors which the

Act requires to be considered . . . would be an action contrary to law and normally reversible error." Fielding, supra at 1360. (Emphasis supplied.)

Fielding is concerned with a section of the Speedy Trial Act which is not relevant to the issues herein. Moreover, in Fielding the government moved for continuance not the Defendant. In the case at bar the Defendant moved for dismissal of an indictment, not the Government. The Defendant in Fielding was subject to possible prejudice by the district court's granting of the government's motion for continuance. In the case at bar only the government could be prejudiced by the granting of the Defendant's dismissal. the Defendant in the case at bar initiated

the dismissal motion and had nothing to lose but everything to gain by the Court's granting of the dismissal. In sum, the factual and legal differences between Fielding and the case at bar are so disparate that Fielding is simply not worthy of great consideration in this context and certainly not dispositive. Fielding is not applicable to the case at bar.

Nor does the Court find any merit in Defendant's contention that a hearing should have been convened to determine whether the dismissal should have been with or without prejudice. Title 18, United States Code, Section 3162(a)(2) does not require a hearing and the Defendant fails to cite any law which requires such a hearing.

For all of the aforementioned reasons, the Defendant's motion for dismissal of the present indictment on the ground that the Court's Order entered April 4, 1985 is void is hereby ORDERED DENIED.

. . .

[irrelevant portions excluded]

IT IS SO ORDERED this 27th day of January, 1986.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 1:85-00080

GROVER C. JONES, JR.

ORDER

On the 23rd day of January, 1986 the Defendant, Grover C. Jones, Jr., appeared before the Court in person and through his counsel, Messrs. W. Dale Greene and Harry L. Kirkpatrick, III. The United States also appeared through its counsel, First Assistant United States Attorney Charles T. Miller and Assistant United States Attorney Richard S. Glaser, Jr.

The Defendant and the aforementioned counsel were before the Court via the Government's proposal to introduce certain evidence coming within the purview of Rule 404(b) of the Federal Rules of Evidence and the objections of the Defendant thereto. By request and agreement of counsel this hearing was closed to the public.

Specifically, the Government seeks to acquire the Court's imprimatur to introduce into evidence at the trial of this matter alleged similar acts of arson which allegedly occurred at the following dates and locations:

1. September 20, 1976
   East Main Street
   Peterstown, West Virginia

2. May 30, 1977
   Route 1, Box 69
   Greenville, West Virginia

3. November 1, 1977
Route 219
Peterstown, West Virginia
150 feet east of Route 219

4. November 1, 1977
State Farm Insurance Agency
Route 219
Peterstown, West Virginia

5. May 5, 1981
210 Vermillion Street
Athens, West Virginia

6. June 25, 1982
1 1/2 miles north of Peterstown, West Virginia on Route 219

In support of its proposal the Government proffered transcripts of the August 26, 1985 testimony of Joseph Whitlow, the August 27, 1985 testimony of John B. Whitlow, Sr., the August 27, 1985 testimony of Richard Lewis and one other transcript of John B. Whitlow's, (Sr.), testimony which is not dated. All of this testimony, as best the Court

can determine, was previously proffered in chambers during the so called "Murder for Hire" trial which was before this Court on a previous occasion and which involved the same Defendant.

The Government argues that the alleged similar events are admissible for at least one or more of the following permissible uses listed in Rule 404(b) of the Federal Rules of Evidence: (1) to show the Defendant's motive; (2) to show the Defendant's preparation and plan; and (3) to show the Defendant's lack of mistake and/or accident vis a vis the crime charged in the present indictment. In addition, the Government contends that the presentation of these similar acts to

the jury is necessary to prove their case-in-chief.

The Defendant, however, objects that the proposed evidence is highly prejudicial, unreliable and that many of the acts alleged occurred so far in the past that they are irrelevant. Also, the Defendant would describe the evidence as fabricated as it relates to his alleged involvement in arson.

At the outset the Court notes that the perameters and procedures for dealing with Rule 404(b) inquiries vary considerably from one Circuit to another. See, Admissibility Under Rule 404(b) of Evidence of Other Crimes, Wrongs, or Acts Similar to Offense Charged to Show Preparation or Plan, 47 A.L.R. Fed. 78 (1978); Admissibility in

Federal Conspiracy Prosectuion of Evidence of Defendant's Similar Prior Criminal Act, 20 A.L.R. Fed. 125 (1973). Consequently, to the extent available, applicable and prudent this Court will rely heavily but not exclusively on Fourth Circuit precedent.

The first step in an analysis of Rule 404(b) issues herein, is to determine if the alleged similar acts of arson are (a) fires which fall within one of the Rule 404(b) categories listed in the rule or elsewhere, and (b) relevant to an issue in this case. This is the approach required by the case law. See, e.g., United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982); United States v. Brugman, 655 F.2d 540, 544-45 (4th Cir. 1981); United

States v. Foutz, 540 F.2d 733, 737 (4th Cir. 1976).

A careful analysis of each of the alleged similar acts convinces this Court that the acts are indeed probative of the Defendant's possible motive, plan, preparation and lack of mistake and/or accident vis a vis the alleged arson charged in the indictment. Thus, each similar alleged act involves substantially similar preparations, plans, motives, etc.

Further, the Court's analysis convinces it that the alleged similar acts are relevant inasmuch as they have a "tendancy to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence". Fed.R.Evid. Rule 404(b).

The next and second step in the analysis under Rule 404(b) is to engage in the balancing of the probative value of the evidence with its prejudicial impact. United States v. Johnson, 634 F.2d 735, 737 (4th Cir. 1980), cert. denied, 451 U.S. 907 (1980).

In order to determine the probative value of a similar act, the Court chooses to examine, inter alia, the following factors: (1) the similarity between the similar act and the principal act or acts charged in the indictment; (2) the temporal proximity of the similar act in relation to the principal act or acts charged in the indictment; (3) the reliability of the

similar act; and (4) the necessity of the similar act to the Government's case. United States v. Beahm, 664 F.2d 414, 417 (4th Cir. 1981); United States v. Davis, 657 F.2d 637, 639 (4th Cir. 1981). See also, Judge Friendly's decision in United States v. Byrd, 352 F.2d 570, 574-75 (2d Cir. 1965).

The Court has carefully applied each of the factors to the similar acts the Government seeks to introduce and finds that it is not presently in a position to assess as thoroughly as it desires to the reliability and necessity of the alleged acts which occurred in the years 1976-1977, or alleged acts 1, 2, 3 and 4 listed herein supra. These factors are particularly important to the Court vis a vis the alleged acts of

1976-77 because those alleged acts are somewhat distant temporally from the principal acts charged in the indictment, notwithstanding the fact that the alleged acts are strikingly similar to the acts charged. Although the transcripts of testimony which were proffered along with the Court's knowledge of this case provide the Court with a substantial indication of the reliability and necessity of presenting the alleged 1976-1977 acts the Court believes it will be in a better position to weigh these factors after the trial begins and some evidence has been presented. The defendant is hereby put on NOTICE that he should be prepared to present a defense to the 1976-1977 alleged acts. This will prevent any

possible prejudice to the Defendant should the Court decide in favor of admitting said alleged acts. At this juncture, several factors seem to favor admission of the alleged 1976-1977 acts. But, in an abundance of caution the Court shall refrain from ruling on these alleged acts at this time.

The alleged acts of 1981-1982 present a different situation. Those alleged acts are also similar to the act or acts charged. They are close temporally to the act charged. The temporal closeness tends to bolster their reliability. The Court can readily envision that these events are important vis a vis the Government's case.

For all of the aforementioned reasons, it is hereby ORDERED that the Court shall defer ruling on alleged acts 1, 2, 3 and 4 listed herein and proposed by the Government. But, it is also hereby ORDERED that the Government shall be allowed to present evidence of alleged acts 5 and 6 listed herein. This authorization should not be construed as carte blanche permission to present evidence of every fact or event surrounding alleged acts 5 and 6. Any alleged death threats or references to drug possession, etc., if any there by, may be subject to exclusion and the Court reserves the prerogative to further refine the ruling herein as the trial proceeds.

The Clerk is directed to mail a certified copy of this Order to counsel of record. Following such mailings this Order shall be SEALED by the Clerk and the recipients of this Order shall keep confidential the contents thereof to the extent they might prejudice the Defendant.

IT IS SO ORDERED this 29th day of January, 1986.

ENTER:

_____

ELIZABETH V. HALLANAN
United States District Judge

THIS DOCUMENT UNSEALED BY ORDER OF HONORABLE ELIZABETH V. HALLANAN, UNITED STATES DISTRICT JUDGE, ENTERED OF RECORD JULY 31, 1986 FOR PURPOSE OF PREPARING ROA.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 1:85-00080

GROVER C. JONES, JR.

MEMORANDUM ORDER

I. Introduction

On June 3rd, 4th and 5th, 1986, Defendant Grover C. Jones, Jr., appeared, in person, and by his appointed counsel, H.L. Kirkpatrick, III and Kevin Burgess. The United States appeared through its counsel, Assistant United States Attorney Nancy C. Hill. The parties were before the Court to argue Defendant's motion to enforce an

alleged plea agreement which Defendant claims he and his attorneys consummated between himself and the United States. During the course of the hearing Defendant also requested permission to argue his motion to dismiss the five-count mail fraud indictment pending against him on grounds that such dismissal was warranted due to alleged prosecutorial misconduct. The Court granted his request and Defendant argued said motion at the conclusion of the evidentiary portion of the hearing on the motion to enforce the alleged plea agreement.

Defendant is co-counsel on his own behalf. Thus, Defendant argued in his own behalf and examined witnesses as did his appointed counsel.

Defendant moved the Court to close the hearing from the public. The United States did not oppose that motion. The Court, considering the possible prejudice to the Defendant because of the subject matter of the motion to dismiss, granted Defendant's motion to close the hearing.

II. Facts, Relevant to Defendant's Motions

On or about the middle of April, 1986, Assistant United States Attorney Richard S. Glaser (hereinafter AUSA Glaser) contacted defense counsel H.L. Kirkpatrick, III to suggest the possibility of plea bargain discussions. On April 25, 1986 a meeting was conducted in the office of the United

States Attorney in Beckley, West Virginia. The following individuals attended: Defendant, Mr. Kirkpatrick, First Assistant United States Attorney Wayne A. Rich, Jr. (hereinafter FAUSA Rich) and AUSA Glaser. No plea agreement was reached during this meeting.

At Defendant's request another meeting was scheduled on May 2, 1986. That meeting was held with the following persons in attendance: Defendant, Mr. Kirkpatrick, AUSA Glaser, and United States Attorney for the Southern District of West Virginia David A. Faber (hereinafter USA Faber). This meeting was convened in the office of the United States Attorney at Beckley, West Virginia. By authorization of USA

Faber, the meeting was secretly tape recorded. USA Faber testified that the recording was done because the United States believed the Defendant would appear unrepresented by his appointed counsel. Defendant points out that no attempt was made by the United States to discontinue the secret recording of conversations when it became apparent that Defendant was represented by counsel at the meeting. The Court has reviewed this tape and notes that no plea agreement was consummated at this meeting. USA Faber, however, made statements during the meeting suggesting that the parties were close to a plea agreement and that the Defendant and himself should allow their respective attorneys to complete the negotiations.

USA Faber analogized the situation to a civil case in which the parties are close to settlement and the final nuances should be done by the parties' attorneys. AUSA Glaser would represent USA Faber and Messrs. Kirkpatrick and Burgess would represent Defendant in further negotiations. Soon after the May 2, 1986 conference, AUSA Glaser allegedly telephoned Mr. Kirkpatrick to inform him that USA Faber was pleased with the results of the meeting and had developed some respect for Defendant who would no longer be simply a name on an indictment. Thereafter, an indeterminate but prodigious number of telephone conferences were held between Mr. Kirkpatrick and AUSA Glaser.

On May 20, 1986, another meeting was held in the office of the United States Attorney at Beckley with the following persons in attendance: Defendant, AUSA Glaser and Defendant's minor son. AUSA Glaser presented Defendant with a letter setting forth a proposed plea agreement. The parties first discussed a plea to one count of mail fraud. Defendant, however, rejected this proposal. Consequently, it was suggested that Defendant might plead to misprision of a felony and a weapons violation, carrying with them a maximum prison exposure of three (3) years and two (2) years respectively. Other possible plea agreement terms were discussed. Defendant, for example, suggested that he receive credit for

prison time for the period he was committed to the Federal Correctional Institution at Butner, North Carolina and for his time spent on a bond which restricted his activities. USA Faber had previously expressed skepticism as to whether his office or the Court could grant the credit for bail time.

AUSA Glaser contacted by telephone USA Faber who was out of town serving as a reservist in one of the military branches. The evidence indicates that USA Faber had no objection to Defendant pleading to the two aforesaid felonies so long as a factual basis existed for each. But, USA Faber conditioned his approval of other unrelated terms in the agreement upon the approval of the agreement by FAUSA Rich.

The evidence indicates that AUSA Glaser must have interpreted USA Faber's telephone responses to mean that the essence of the two-felony plea agreement was approved. AUSA Glaser telephoned Defendant's residence after he spoke with USA Faber. Defendant's ex-wife, Patricia Jones, answered the phone. Patricia Jones testified that AUSA Glaser indicated to her that he had "good news" for Defendant. Defendant then spoke with AUSA Glaser. Defendant contends that AUSA Glaser indicated to him that the parties had a deal. AUSA Glaser then telephoned Defendant's attorney H.L. Kirkpatrick at approximately 11:30 p.m. on the night of May 20, 1986. Mr. Kirkpatrick testified that AUSA Glaser indicated that the

parties had an agreement. Mr. Kirkpatrick believes that AUSA Glaser stated: "Buddy, we have a deal" or something very close to those words.

On May 21, 1986 the following persons met at the United States Attorney's Office at Beckley: Defendant, Mr. Kirkpatrick, Mr. Burgess and AUSA Glaser. More details of the plea agreement were discussed.

On May 21, 1986 FAUSA Rich and Assistant United States Attorney Charles T. Miller (hereinafter AUSA Miller) reviewed the plea agreement and independently concluded that many provisions were unacceptable. It was their opinion that certain provisions were of questionable legality (e.g. recommendation for credit for time on

bail) and other terms were in appropriate. At FAUSA Rick's direction, AUSA Glaser telephoned Mr. Kirkpatrick on May 22, 1986 and informed him that there was no plea agreement. On May 21 or 22, 1986 Judge Charles M. Lobbin and Trooper Charles Coburn and Postal Inspector William Pauer were consulted concerning the proposed plea agreement by representatives of the United States Attorney's Office.

After AUSA Glaser informed Mr. Kirkpatrick that there was no plea agreement, AUSA Miller telephoned Mr. Kirkpatrick to inquire concerning the alleged plea agreement. This telephone conversation was secretly tape recorded by AUSA Miller.

It should also be noted that during the negotiations described herein, AUSA Glaser telephoned the Honorable Charles H. Haden, II, Chief Judge of the Southern District of West Virginia and requested that he consider scheduling a hearing on the proposed plea agreement for the purpose of accepting guilty pleas and sentencing the Defendant, inasmuch as the Honorable Elizabeth V. Hallanan, United States District Judge for the Southern District of West Virginia, was out of town. Prior to contacting Chief Judge Haden and before Judge Hallanan departed to go out of town, AUSA Glaser contacted Theodore P. Kennedy, Jr., who is a Law Clerk employed by Judge Hallanan. AUSA Glaser requested that Mr. Kennedy ask Judge

Hallanan if she would discuss a proposed plea with the parties. Mr. Kennedy relayed the message to Judge Hallanan who instructed Mr. Kennedy to inform AUSA Glaser that she would make no reply until the parties submitted to her a written letter signed by Defendant and all counsel describing exactly what they were requesting from her Court. Mr. Kennedy conveyed Judge Hallanan's message in those precise terms to AUSA Glaser. The Court never received any letter.

Defendant contends that all of the aforesaid facts as well as previous conduct of the Office of the United States Attorney amounts to prosecutorial misconduct on the part of the Office of the United States Attorney warranting

dismissal of the indictment against him. Specifically, Defendant argues that the aborted plea agreement process prejudiced him in at least the following ways: his attorneys have been unable to devote all of their energies to trial preparation; Defendant ceased attempting to raise funds to employ private counsel of his choice; and witnesses who will testify in the upcoming trial have been prejudiced by having learned of the plea agreement negotiations, proposals, etc. Defendant also renews previous arguments that exculpatory materials were withheld from the grand jury which indicted him. The United States opposes and denies Defendant's claims. The Court notes that Defendant recently field a motion to allow withdrawal of his appointed

counsel on grounds that Defendant is no longer indigent and wishes to employ counsel of his own choice.

Toward the end of the hearing, Defendant made the following motions: Motion for entire transcript of proceeding described herein; Motion for appointment of a Special Prosecutor to investigate the Office of the United States Attorney; and that a transcript of this hearing be given to the Attorney General of the United States of America. The United States opposes these motions as being groundless. But, the United States would not oppose the Defendant having some portions of a transcript of the proceedings herein. After having summarized the relevant facts and

motions the Court shall render its decision and analysis infra.

II. Legal Analysis and Decisions

1. Defendant's Motion to Enforce Plea Agreement

In the case of Cooper v. United States, 594 F.2d 12 (4th Cir. 1979) the Court provided guidance concerning analysis of plea agreements and negotiations and enforcement thereof. The Court in Cooper recommended that contract law analogies were helpful in analyzing plea agreements. Cooper, 594 F.2d 17. In Cooper the Court warned, however, that contract law was not the exclusive source of authority for deciding cases such as the one at bar. Id. Additionally, the Court in Cooper

found that a Defendant's Fifth and Sixth Amendment rights under the Constitution were implicated in plea agreement negotiations. Mabry v. Johnson, 467 U.S. 504, 104 S.Ct. 2543 (1984) reversed Cooper to the extent that the Mabry Court found that Fifth and Sixth Amendment rights were not implicated in plea negotiations. But, the Court in Mabry warned that the conditions for a valid plea presumed fairness in negotiations between a criminal Defendant and the prosecutor. Mabry, 104 S.Ct. 2543. The Fourth Circuit has acknowledged Mabry's partial reversal of Cooper. United States v. Riley, No. 84-5084 (4th Cir. Unpublished 1986) (Footnote 2). The use of contract

analogies in the plea agreement context remains valid, however, Id.

Consequently, the Court will utilize contract law analogies to the extent appropriate, keeping in mind that plea agreements are a peculiar breed of contract the performance of which ultimately depends on the approval of the appropriate Court. Rule 11, Federal Rules of Criminal Procedure.

The Court is of the opinion that a plea agreement was consummated between the Defendant and the United States on the night of May 20, 1986 when AUSA Glaser does not deny that he may have informed Mr. Kirkpatrick on May 20, 1986 that: "Buddy, we have a deal". The Court believes at this point the "essence of the agreement" was accepted

by both parties. Judge Learned Hand once stated:

> "A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposed upon them, he would still be held, unless there were some mutual mistake, or something else of the sort."

Hotchkiss v. National City Bank, 200 F.287, 293 (S.D.N.Y. 1911) (Emphasis Supplied).

The words and conduct of the United States would have lead a reasonable Defendant in similar circumstances to

believe that a contract had been formed. AUSA Glaser was clothed with the indicia of some degree of authority to act as USA Faber's lawyer, particularly in light of his statements to this effect on the taped May 2, 1986 meeting made in the presence of Defendant and his counsel. Further, it appears that USA Faber did not object to the Defendant pleading to two felonies: one involving misprision and one involving a weapons violation. This apparently lead AUSA Glaser to believe that the essence of the plea agreement was approved by USA Faber. The Court cannot say what the subjective intent of the parties was at the time the agreement was formed. Nor is the Court required to determine their subjective intent. The Court only looks

at their objective acts and words and the word of "twenty bishops" that the objective acts and words of the parties belies their true subjective intent will not change the fact that a contract was formed. The Office of the United States Attorney is not a "babe in the woods" when conducting business with an accused and is aware of the proper safeguards to avoid confusion.

Because the Court believes USA Faber's words and actions indicated approval of a plea to the two aforesaid felony counts, it is unnecessary to reach the issues of detrimental reliance and/or equitable estoppel. The Court notes, however, that in extraordinary and appropriate cases equitable estoppel might be applied against the United

States in the plea agreement context. Such estoppel is possible against the United States and others in other contexts. Spears v. Federal Corp Ins. Corp., 579 F.Supp. 1022 (E.D. Tenn. 1984); State of Tenn ex rel Leech v. Dole, 567 F.Supp. 704 (M.D. Tenn. 1983). The Fourth Circuit has implied that estoppel may be appropriate against the United States in the right circumstances. United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir. 1978).

This brings the Court to the issue of which terms constitute the essence of the plea agreement. After laborious analysis the Court concludes that the following terms taken from one of the parties' May 19, 1986 drafts and

exclusively the following terms approved by USA Faber and are the sole terms which are sufficiently certain enough to enforce:

H.L. Kirkpatrick, III, Esq.
Ashworth & Kirkpatrick
P.O. Drawer AA
Beckley, West Virginia 25801

Re: United States v.
Grover C. Jones, Jr.
Criminal No.
1:85-00080 (USDC SDWVa)

Dear Mr. Kirkpatrick:

This will confirm our conversations with regard to your client, Grover C. Jones, Jr. (hereinafter "Mr. Jones"). As a result of these conversations, it is agreed by and between the United States and Mr. Jones as follows:

1. Mr. Jones is charged in a five-count indictment as follows: Counts One through Five charge Mr. Jones with violations of 18 U.S.C., Sections 1341 and 2 (mail fraud).

Mr. Jones agrees to waive his right pursuant to Rule 7 under Rules of Criminal Procedure to be indicted by a grand Jury and agrees to be charged by Information with violations of two following felonies:

a) 18. U.S.C. 4 (misprison (sic) of felony) and

b) 18 Appendix 1202 and 2 (aiding and abetting a felon in possession of a shotgun).

3. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 U.S.C. Section 4 is imprisonment for a period of three (3) years and a fine of $500.00. The maximum penalty to which Mr. Jones will be exposed by virtue of his guilty plea concerning 18 Appendix 1202 and II is imprisonment for a period of two (2) and a fine of $10,000 for a total penalty of imprisonment of five (5) years and a fine of $10,500. Mr. Jones will also be subject to the provisions of the Victim and Witness Protection Act of 1982, and criminal assessment pursuant to Title 18, United States Code, Section 3013, if

applicable. The $50.00 criminal assessment will be paid in full on the date Mr. Jones enters his plea of guilty.

4. Mr. Jones will be completely forthright and truthful with this office and federal, state and local law enforcement agents with regard to all inquires made of him. Mr. Jones will give signed, sworn statements, grand jury testimony and trial testimony relative thereto, if same is deemed necessary.

6. Nothing contained in any statement or testimony given by Mr. Jones pursuant to this agreement or any evidence developed therefrom will be used against him in any further criminal prosecutions unless this agreement becomes void due to violation of any of its terms by Mr. Jones. However, this agreement does not prevent Mr. Jones from being prosecuted for any violations of federal and state laws he may have committed should evidence of any such violations be obtained from an independent, legitimate source, separate and apart from that information and testimony

being provided by him pursuant to this agreement. In addition, nothing contained in this agreement shall prevent the United States from prosecuting Mr. Jones for perjury or the giving of a false statement to a federal agent, if such a situation should occur by virtue of his failing to be fully forthright and truthful pursuant to paragraph 4 herein.

7. At final disposition, the United States will advise the Court of the nature and extent of Mr. Jones' forthrightness and truthfulness, or failure to be forthright and truthful, and ask the Court to give same such weight as the Court deems appropriate. Mr. Jones has indicated to the United States that he will make motions concerning concurrent sentences, the limitation of probation and the imposition of a limited fine -- the United States will remain moot and not oppose these motions but reserves the right to address the Court concerning these motions if called upon by the Court to do such. If the Court decides to give Mr. Jones a period of probation, the United States will not

oppose Mr. Jones seeking job employment and working outside the Southern District of West Virginia and within the continental United States.

9. If either the United States or Mr. Jones violate the terms of this agreement, the other party will have the right to void this agreement. If the Court refuses to accept the terms of this agreement, it shall be void.

10. Following final disposition, the United States will move the Court to dismiss Counts Two, Three, Four and Five in Criminal No. 1:85-00080 as to Mr. Jones.

11. This written agreement constitutes the entire agreement between the United States and Mr. Jones in this matter. There are no agreements, understandings, or recommendations as to any other pending or future charges against Mr. Jones in any court other than the United States District Court for the Southern District of West Virginia.

Very truly yours,

DAVID A. FABER

United States
Attorney

By:

RICHARD S. GLASER, JR.
Assistant United States Attorney

RSG/jro

As evidence by my signature at the bottom of the three pages of this letter agreement, I have read and understand the provisions of each paragraph herein and, hereby, fully approve of each provision.

The terms found valid by the Court are the terms involving the basic felonies and agreement likely to be consistent with a plea to those felonies. Other inconsistent or unrelated terms made conditional have been deleted from the May 19, 1986 draft quoted above as being uncertain and not

approved by USA Faber by telephone or otherwise and are not recognized by this Court as part of the plea agreement.

Therefore, to the extent enumerated supra Defendant's motion to enforce the plea agreement hereby is ORDERED GRANTED. The court makes no comment or predictions concerning whether it will approve the plea agreement found by the Court to exist if the Defendant seeks to plead guilty pursuant to said agreement.

If the Defendant wishes to proceed on the plea agreement found to exist by the Court, he shall forthwith and no later than two days after entry of this Order notify the Court in writing of his intent to proceed on the plea agreement. Said letter should be signed by the Defendant and his counsel. The

Defendant, of course, is free to reject the agreement reached between himself and the United States as found by the Court.

Regardless of Defendant's intent vis a vis the plea agreement, the Court shall continue to schedule the trial of this case and if Defendant chooses not to proceed on a plea agreement, Defendant shall be tried on the pending five-count indictment.

. . .

[irrelevant portions excluded]

The Clerk is directed to mail a certified copy of the Memorandum Order to all counsel of record, Defendant, United States Marshal for the Southern District of West Virginia, the Court

Reporter and the Probation Department of this Court. The recipients of this Memorandum Order hereby are ORDERED to keep confidential the contents of said Memorandum Order. The Clerk is directed to SEAL this Memorandum Order after mailing certified copies as directed above.

IT IS SO ORDERED this 10th day of June, 1986.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge

THIS DOCUMENT UNSEALED BY ORDER OF
HONORABLE ELIZABETH V. HALLANAN,
UNITED STATES DISTRICT JUDGE,
ENTERED OF RECORD JULY 31, 1986
FOR PURPOSE OF PREPARING ROA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 1:85-00080

GROVER C. JONES, JR.

ORDER

This matter is before the Court on Defendant's motion to dismiss the indictment. The United States has filed its response thereto and the motion is now in a procedural posture for decision. In said motion to dismiss, Defendant cites seven grounds in support thereof. The Court will address each ground in seriatim.

1. This Court erred in failing to dismiss the indictment in

Criminal Action No. 1:85-00080
with prejudice

This matter was fully addressed in this court's Order entered January 27, 1986 in the above-captioned matter. Defendant has cited nothing new that would cause this Court to reconsider its decision in the aforementioned Order. Accordingly, for the reasons cited by this Court in its Order entered January 27, 1986 herein, Defendant's motion to dismiss the indictment insofar as it related to this ground is ORDERED DENIED.

. . .

[irrelevant portsion excluded]

IT IS SO ORDERED this 8th day of July, 1986.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF WEST VIRGINIA
BLUEFIELD

UNITED STATES OF AMERICA

v. Criminal No. 1:85-00080

GROVER C. JONES, JR.

ORDER

On the 4th day of June, 1987 came the Defendant, Grover C. Jones, Jr., in person and through co-counsel Robert P. Martin and Arthur T. Ciccarello. The United States appeared through Assistant United States Attorney Nancy C. Hill and Charles T. Miller.

The parties were before the Court to present argument and evidence

concerning the following three pretrial issues:

1. The admissibility of four alleged similar acts which the Government seeks to introduce pursuant to Rule 404(b), Fed.R.Evid.;

2. Government's motion to exclude from the jury evidence of Defendant's acquittal in the so-called "Murder for Hire" trial; and

3. Defendant's motion to exclude testimony of witnesses having knowledge of certain negotiations between the Defendant and the United States.

The Court heard argument seriately concerning each motion and ruled upon each motion.

Admissibility of 404(b) Evidence

After hearing extensive testimony by witnesses the Court was and is of the opinion that the alleged similar acts allegedly committed September 20, 1976, May 30, 1977 and November 1, 1977 are admissible. In an Order entered January 29, 1986 at Page 2 these acts are numbered 1, 2 and 3 respectively. Alleged act numbered 4 in that same Order cited supra was ruled inadmissible. In the Order entered January 29, 1986 the Court had ruled that alleged similar acts numbered 5 and 6 on Page 2 of said Order were admissible. The Court, however, had withheld ruling upon alleged similar acts 1 through 4 until the Court heard further evidence at trial. Consequently, the United States moved

the Court to allow it to present its evidence concerning acts 1 through 4 in advance of trial. The Court granted the Government's request.

As stated previously, after hearing the additional evidence presented the Court is of the opinion that acts numbered 1 through 3 in the Court's Order entered January 29, 1986 are admissible while the act numbered 4 in the same Order is inadmissible.

The parameters and procedures for dealing with Rule 404(b) inquiries vary considerably from one Circuit to another. See, Admissibility Under Rule 404(b) of Evidence of Other Crimes, Wrongs, or Acts Similar to Offense Charged to Show Preparation or Plan, 47 A.L.R. Fed. 78 (1978); Admissibility in

Federal Conspiracy Prosecution of Evidence of Defendant's Similar Prior Criminal Act, 20 A.L.R. Fed. 125 (1973). Consequently, to the extent available, applicable and prudent this Court will rely heavily but not exclusively on Fourth Circuit precedent.

The first step in an analysis of Rule 404(b) issues herein, is to determine if the alleged similar acts of arson are (a) fires which fall within one of the Rule 404(b) categories listed in the rule or elsewhere, and (b) relevant to an issue in this case. This is the approach required by the case law. See, e.g., United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982); United States v. Brugman, 655 F.2d 540, 544-45 (4th Cir. 1981); United

States v. Foutz, 540 F.2d 733, 737 (4th Cir. 1976).

A careful analysis of the evidence and each of the alleged similar acts numbered 1, 2 and 3 in the Order entered January 29, 1986 convinces this Court that the acts are indeed probative of the Defendant's possible motive, plan, preparation and lack of mistake and/or accident vis a vis the alleged arson charged in the indictment. Thus, each similar alleged act involves substantially similar preparations, plans, motives, etc.

Further, the Court's analysis convinces it that the alleged similar acts are relevant inasmuch as they have a "tendency to make the existence of any fact that is of consequence to the

determination of the act more probable or less probable than it would be without the evidence". Fed.R.Evid. Rule 404(b).

The next and second step in the analysis under Rule 404(b) is to engage in the balancing of the probative value of the evidence with its prejudical impact. United States v. Johnson, 634 F.2d 735, 737 (4th Cir. 1980), cert. denied, 451 U.S. 907 (1980).

In order to determine the probative value of a similar act, the Court chooses to examine, inter alia, the following factors: (1) the similarity between the similar act and the principal act or acts charged in the indictment; (3) the reliability of the similar act; and (4) the necessity of

the similar act to the Government's case. United States v. Beahm, 664 F.2d 414, 417 (4th Cir. 1981); United States v. Davis, 657 F.2d 637, 639 (4th Cir. 1981). See also, Judge Friendly's decision in United States v. Byrd, 352 F.2d 570, 574-75 (2d Cir. 1965).

The Court has carefully applied each of the factors to the similar acts the Government seeks to introduce and finds that the alleged acts numbered 1 through 3 in the Order entered January 29, 1986 like the acts numbered 5 and 6 in said Order are similar to the act or acts charged. They are close enough temporally to the act charged and the Court can readily envision that these events are important vis a vis the Government's case.

For all of the aforementioned reasons, it was and is hereby ORDERED that the Government shall be allowed to present evidence of alleged acts 1 through 3 in the Court's Order entered January 29, 1986. This authorization should not be construed as carte blanche permission to present evidence of every fact or event surrounding the alleged acts. Any alleged death threats or references to drug possession, etc., if any there be, may be subject to exclusion and the Court reserves the prerogative to further refine the ruling herein as the trial proceeds.

The Government's request to present evidence of the alleged similar act which is numbered 4 in the Court's Order entered January 29, 1986 was and is

ORDERED DENIED as not being relevant or similar enough to meet the test of Rule 404(b), Fed.R.Evid. The Court as previously mentioned has already ruled that the alleged similar acts numbered 5 and 6 in the Order entered January 29, 1986 are admissible and shall allow its previous ruling to speak concerning those matters.

. . .

[irrelevant portions excluded]

IT IS SO ORDERED this 5th day of June, 1987.

ENTER:

ELIZABETH V. HALLANAN
United States District Judge